



Reforming America's Immigration System Once and for All

By Matt A. Mayer

October 2016

Key Points

- Although illegal immigration remains one of the country's top issues, much focus is placed only on its economic aspect while its security aspect is often lost in debate.
- Because of the uncertain number of illegal immigrants in the country, Washington cannot create a permanent solution without first ensuring border security, enhancing interior enforcement, and establishing an efficient visa and naturalization system.
- Over the next year and with the instatement of a new presidential administration and Congress, we must make these reforms to secure America's borders, cities, jobs, and citizenship.

No issue generates more passion in voters today than illegal immigration. Because of the focus on the economic aspect of illegal immigration, the security aspect is often lost in the debate. It is axiomatic, however, that if 11 million illegal immigrants looking for work can cross America's porous borders or overstay visas, then a handful of terrorists certainly can, too. This reality, therefore, requires us to determine who is here, who is coming, and who is going.

Until now, the federal government has acted without giving proper thought to the incentives or disincentives related to illegal immigration. This history makes it all the more important that Washington fixes the problem by enforcing existing laws, providing additional authorities for border and interior enforcement where needed, and reforming America's counterproductive visa and naturalization system. Washington can create a permanent solution for the remaining illegal immigrants here that all Americans will support only once America's borders are secure, foreign visitors cannot overstay their visas, and employers can fill their hiring needs with legal rather than

illegal workers. Until then, any amnesty proposal is premature because of the uncertain number of remaining illegal immigrants.

The Three-Legged Stool of Immigration

To identify a way forward, it is useful to view immigration as a stool built on three legs and recognize that a weakness in one leg creates structural pressure on the other legs, thereby risking the collapse of the stool itself. Immigration is largely a classic supply-and-demand problem: there is a readily available supply of labor for employers and, given America's traditionally low unemployment figures, a demand for that labor.

The first leg is ensuring border security. If America cannot secure its border and significantly slow or stop the flow of illegal immigrants, it will be a Sisyphean task to locate, detain, and remove illegal immigrants once they are inside the country. Increasing the transactional cost for illegal immigrants and human traffickers will reduce the supply of illegal immigrants. A more secure border will make it harder to get across, thereby driving

up the coyotes' transit costs, with many illegal immigrants unable to afford the increased fees.

The next leg is enhancing the efficacy of federal, state, and local interior enforcement actions. These require cracking down on businesses who hire illegal immigrants. By increasing the transactional costs for employers, the demand for illegal immigrants decreases, and the supply decreases because the increased difficulty in finding jobs imposes transaction costs on illegal immigrants themselves. America has never truly enforced the laws on employers hiring illegal immigrants but has adopted a minimal enforcement approach. Even using E-Verify is voluntary. By getting more aggressive with employers, the use of illegal labor will invariably decline.

Controlling the border remains a priority, especially because once inside the US, law enforcement's chances of intercepting smugglers and drugs decreases dramatically.

The third leg is establishing an efficient and vibrant visa and naturalization system. This leg requires visa transformation policies that substantially increase the number of work visas so that employers can legally bring in labor when their needs remain unmet by the existing population. A concomitant action is to shorten the time it takes for foreigners to become American citizens. These elements focus on both supply and demand by reducing the incentives to illegally enter the United States. Similarly, increasing the number of highly skilled workers will ensure that the world's best, brightest, and greatest risk takers compete for America, not against it.

Overall, a solution to the illegal immigration challenge that incorporates direct and indirect transactional costs within each of the three legs provides the right incentives and disincentives for American businesses, workers, and immigrants.

Leg One: Secure the Border. First and most importantly, more can be done to secure

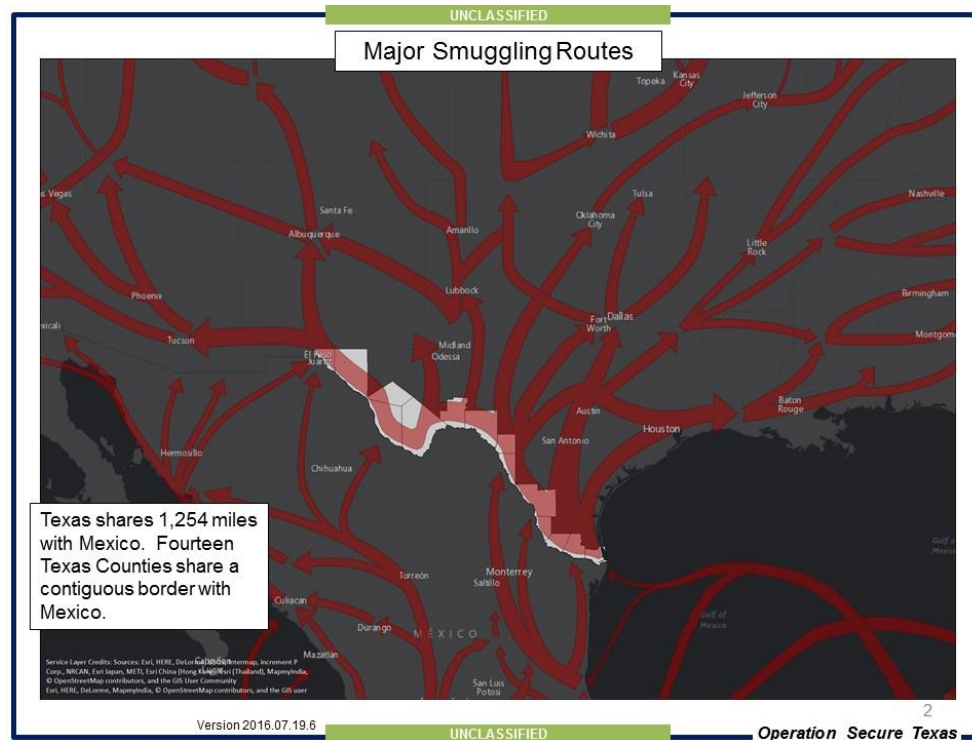
America's southern border, where authorities face numerous challenges such as drug smuggling, human trafficking, and terrorism. Each state also faces unique elements along its border, meaning governors need to play a large role in determining what needs to be done on the border regarding resource allocations and when the border is, in fact, secure. The federal government will succeed in securing the southern border only by properly resourcing America's border patrol with staffing, equipment, and training; providing legal authorizations to act more aggressively than presently allowed; and effectively partnering with states.

The US-Mexico border is the primary entry point into the US for all major illicit drugs, rivaling other land, sea, and air routes.¹ Thus, controlling the border remains a priority, especially because once inside the US, law enforcement's chances of intercepting smugglers and drugs decreases dramatically.

The ugly reality is that the drug cartels have dramatically ramped up the sophistication of their activities over the past decade. It no longer is about merely crossing the Rio Grande River or digging a tunnel under the border fence. The drug cartels use fast boats, submersibles, and precise timing to conduct operations. For example, they will time drug runs when school buses are known to be on their routes to increase the risk of US pursuit operations, thereby deterring the police from attempting to interdict them. Smuggling organizations have also developed sophisticated intelligence networks that corrupt Border Patrol agents, share intelligence between other trafficking organizations, and observe and adapt to changes in US laws and policies, making them a tough adversary for law enforcement.²

Equally disturbing is the increase in human smuggling, especially of young girls and women. The drug cartels have figured out that instead of receiving only a single payment from moving people across the border, they can establish lucrative prostitution rings. To keep ahead of the law, the women are moved from city to city on a scheduled basis. This practice can be stopped first by preventing these women from being transported across the border and next by increasing law enforcement and prosecutorial resources to find the networks and incarcerate those involved in it.³

Figure 1. Major Smuggling Routes on the US-Mexico Border



Source: Texas Department of Public Safety, "Operation Secure Texas: Texas Border Security Performance Measures," July 19, 2016, <https://www.dps.texas.gov/PublicInformation/documents/borderSecPerfMeasures20160719.pdf>.

Even more troubling is the potential for terrorists to enter the US from the southern border. Many Central and South American countries recognize the asylum visas of immigrants from Europe and Africa or have lax immigration enforcement themselves.⁴ Individuals coming from the Middle East and North Africa use their documentation to reach the border, but then they discard the paperwork once across the border and claim asylum.⁵ At that point, federal law enforcement has little information about those individuals. The US Government Accountability Office has concluded that the "DHS and the US Department of Justice have limited capabilities to detect and prevent asylum fraud," with few cases being pursued by the federal government each year.⁶ For example, a group of Somalis who crossed the border and sought asylum later engaged in terrorism activities after their asylum requests were granted.⁷

Reports put the number of Special Interest Aliens (SIA)—higher-risk immigrants from some 35 countries in the Middle East, North Africa, and Asia—caught crossing the border in the thousands,

with 740 SIAs in Texas alone in 2015, a 15 percent jump from 2014.⁸ These SIAs came from countries such as Afghanistan, Egypt, Iran, Iraq, Pakistan, Somalia, and Turkey.⁹ Anecdotal evidence demonstrates that foreign terrorists have already attempted to infiltrate the southern border.¹⁰ Even more troubling, leaked documents from the Arizona Counter Terrorism Information Center show that many incidents characterized as "known or suspected terrorist encounters" occurred in border states, including at ports of entry and land border crossings.¹¹

In August 2016, the US Southern Command issued an intelligence report that conceded, "Sunni extremists are infiltrating the United States with the help of alien smugglers in South America and are crossing the US borders with ease."¹² It estimated roughly 30,000 SIAs crossed the border in 2015.¹³

Without stronger federal government efforts, states face serious security threats. Texas alone shares 1,254 miles of border with Mexico, which is 64 percent of the entire southern border, and one of the major smuggling corridors is through the Rio Grande Valley.

Because the federal government has not met its obligations to properly resource and secure the border, Texas allocated more than \$1.7 billion over the past decade to fill the federal gaps. As of February 2016, Texas had deployed 9 tactical boats, nearly 4,000 cameras, 5 aerostats, 12 manned aircraft, 6 joint border operational centers, and several thousand personnel to secure the border.¹⁴ As Figure 2 shows, the deployment of modern equipment is robust, but many gaps still remain.

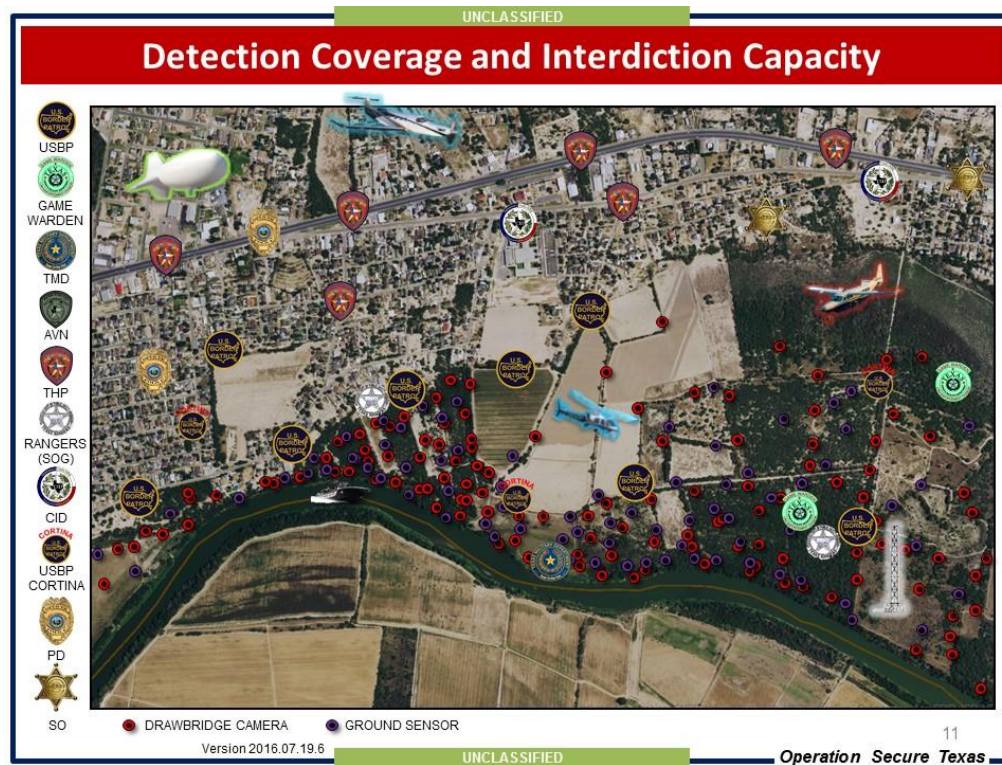
If Congress wants to stop the drug cartels and other criminal entities, it should fully fund all federal elements of border security. That means building a physical wall where the topography makes it feasible or population centers make it necessary; leveraging technology where building a wall is not possible because the terrain is too difficult or low activity levels make constructing a wall an inefficient use of resources; providing the border patrol with the staffing levels, training, and equipment it needs to monitor and defend the border with sufficient force presence to deter crossing attempts; seeking legal authorities when needed to counter drug cartels'

militarization of the border; exchanging data and intelligence with states and localities; and providing supplemental funding to effective state border security initiatives.

Equally important, the federal government should stop treating border security as a political issue because policies such as enforcement, detention, and deportation change, depending on locality and politics, with every administration. This provides ample arbitrage opportunities for drug cartels and other bad actors to exploit.

Leg Two: Strengthen Interior Enforcement Activities. Beyond securing the border, strengthening interior enforcement activities would significantly curb illegal immigration. For example, passing legislation permitting the Department of Homeland Security (DHS) to act on the Social Security Administration's (SSA) no-match letters, with a safe harbor for employers who cooperate in any proceedings, would deter employers from hiring illegal immigrants.

Figure 2. Detection Coverage and Interdiction Capacity



Source: Texas Department of Public Safety, "Operation Secure Texas: Texas Border Security Performance Measures," July 19, 2016, <https://www.dps.texas.gov/PublicInformation/documents/borderSecPerfMeasures20160719.pdf>.

A no-match letter is generated when an employer sends a Social Security number to the SSA for verification.¹⁵ These letters are sent to the employer but not shared with the DHS, so employers face no meaningful consequences for ignoring them.

Further, requiring all employers to use the E-Verify system would also make it harder for employers to hire illegal immigrants. E-Verify is a free electronic system that allows employers to rapidly verify potential workers' employment data by electronically comparing Form I-9 employee information against the hundreds of millions of SSA and DHS records in just a few seconds.¹⁶

Federal funds also should be provided to increase the speed and thoroughness of background checks on visa applicants, including open source reviews to identify potential terrorists.

When the federal government lacks the detention facilities required to detain illegal immigrants and the resources required to prosecute them, a de facto catch-and-release policy exists in which apprehended individuals fail to show for hearings and remain free until apprehended again. To address this, Congress should determine how many detention facilities are needed and fund the construction of the required number of facilities, provide more funding for attorneys to try illegal immigration cases, and enhance identification programs such as the Real ID Act and the Western Hemisphere Travel Initiative (WHTI). A key component of ensuring the US government knows who is in the United States legally is identification. Real ID and WHTI help reduce identification fraud and increase legal presence in America by tightening border-entry requirements and state issuance of identity documentation.

Another major issue affecting interior enforcement actions is whether states and localities possess the inherent authority to enforce federal civil law. To wit, "four of the nineteen 9/11 hijackers had law

enforcement encounters with local police in the six months preceding September 11, 2001."¹⁷ Each one had violated civil provisions of federal immigration law.¹⁸ Had there been a tighter partnership between the federal government and state and local governments and aggressive enforcement of America's immigration laws, maybe at least one of the four—if not more—would have been caught, possibly thwarting the September 11 attack.

Unfortunately, President Barack Obama eliminated the Section 287(g) program that deputized state and local law enforcement personnel to enforce federal immigration laws because of pressure from pro-illegal-immigration groups such as the National Council of La Raza.¹⁹ This program should be reinstituted immediately.

With increased worksite enforcement, more aggressive detention and removal of illegal immigrants, and amplified prosecutions of both illegal immigrants and employers who hire them, the US government will have gone a long way toward ensuring jobs are reserved for those individuals who come to America legally.

Leg Three: Fix America's Flawed Visa System.

Given low unemployment in the United States, the US government should recognize that there are not enough Americans to fully meet the demands of labor—at both the high and low end of the economy.²⁰ In the annual battle for H-1B visas for immigrants in specialized fields, in 2016, employers used the 85,000 visa allotment in five days, which left tens of thousands of high-technology jobs unfilled.²¹ If Congress acknowledges the importance of keeping America competitive by substantially expanding current high-skill visa programs and creating new low-skill visa programs to meet employers' needs, it would be a strong first step toward that goal. Part of the reform can move America away from determining visa and citizenship eligibility based on chain migration factors, such as family relationships, and instead use factors such as education levels and work skills.

Federal funds also should be provided to increase the speed and thoroughness of background checks on visa applicants, including open source reviews to identify potential terrorists. Because immigration cases compete with other cases for

finite judicial resources, increasing penalties for illegal immigration offenses would incentivize US attorneys to try more of such cases.

In exchange for foreign aid or participation in US visa or travel programs, Washington can negotiate readmission accords that require countries to agree in advance to accept back their countrymen found to be living illegally in the United States without burdensome bureaucratic hurdles.²² Given the recalcitrance of some countries such as China,²³ this should be considered a greater diplomatic priority, and the Department of State should exert diplomatic pressure to put these agreements in place. These readmission accords will expedite the deportation of illegal immigrants and alleviate the burden on detention facilities and judicial resources.

For all visa programs, the US needs an enforceable exit process. With nearly half of all illegal immigrants here made up of former visa holders who never left, a secure border alone will not end mass illegal immigration.²⁴ Part of this process would include incentives for visa holders to go home, such as requiring that workers here on visas have a percentage of their wages withheld pending their return to their home country after their visas expire. Similarly, if individuals who come to study in the United States have to provide a bond that would be lost if they fail to leave when their student visas expired, there would be less incentive to overstay. An individual's eligibility for future visas or naturalization should also be contingent on the individual returning to his home country on expiration of the visa, with no waivers provided for those who overstay for shorter periods of time.

The goal of America's visa system should be to allow foreigners to come to America to study, work, and travel as freely as possible and consistent with the needs of the US economy. That system, however, needs a stiff penalty to decrease the incentives individuals have to overstay their visas.

Strike a Grand Bargain on Birthright Citizenship and Amnesty

With those policies established, the final challenges are evaluating the retrospective problem of the remaining illegal immigrants and addressing birthright citizenship.

Because of the uncertain size of the remaining illegal immigrant population, it makes little sense to promise amnesty before America's broken immigration policies are reformed or a special process (i.e., a pathway to citizenship) is created that undermines credibility with the countless immigrants who waited their turn and followed the rules. Fixing what is already broken in the immigration system is the most effective strategy in the short to medium term. Only after reducing the number of illegal immigrants by those actions noted above can amnesty be addressed. Depending on the size of the remaining problem, the solution can be scaled in a manner that does not weaken the three-legged stool and, crucially, once and for all ends mass illegal immigration with a majority of Americans' support.

Finally, citizenship should be about something greater than where someone was born. The idea that a foreigner born in America is automatically granted US citizenship fails to appreciate what it means to be an American and the value citizenship means to Americans. That being said, for more than 100 years, the US has awarded citizenship in this manner.²⁵ The US and Canada are among the only advanced countries that award citizenship to individuals born in those countries regardless of their parents' citizenship status.²⁶

The only realistic and legal way to end this practice is a constitutional amendment. To be consistent with America's strong tradition of promoting family unity, the amendment would likely need to grant citizenship to the parents of the individuals who received citizenship via birthright citizenship. The granting of citizenship, however, would happen only after the birthright citizenship amendment is added to the Constitution. Such a grand bargain requires Americans on both sides of the issue to compromise. If Washington fails to deal with this issue, it will not solve a key hole in America's immigration system, as illegal immigrants still will have an incentive to give birth in America, thereby chaining themselves to the United States.

Conclusion

America is indeed a nation of immigrants. It is also a nation founded, built, and wholly dependent on the sanctity it gives to the rule of law. It is what

distinguishes us from those countries run by dictators and democrats in name only. America's sovereignty rests on ensuring immigration policies work.

The reforms detailed above would enhance border security, ensuring drug traffickers, human smugglers, and terrorists have difficulty entering the US. These reforms would improve the enforcement of federal immigration laws, ensuring jobs go to those immigrants who come here legally. Lastly, they would address America's flawed visa policies and ensure its labor needs are met. In effect, these much-needed reforms would secure America's borders, cities, jobs, and citizenship.

The status quo works only for drug cartels, traffickers, terrorist organizations, scofflaw employers, and illegal immigrants. As is evident across Europe and America, the people want policymakers to take action on these issues. The time to act is over the next year when the American political system resets during a new presidential administration and Congress.

About the Author

Matt A. Mayer (@ohiomatt) is a visiting fellow on homeland security issues and former senior official at the US Department of Homeland Security.

Notes

1. Office of National Drug Control Policy, "National Southwest Border Counternarcotics Strategy," May 2016, 1, https://www.whitehouse.gov/sites/default/files/ondcp/international-partnerships-content/southwest_strategy_-_may_2016_final.pdf.

2. Amy Furr, "Former ICE Agent: Smugglers Have 'More Effective' Intel Network Than US Gov't," CNSNews.com, October 20, 2016, <http://www.cnsnews.com/news/article/amy-furr/former-ice-agent-smugglers-have-more-effective-intelligence-network-us-govt>; and Mike LaSusa, "How Mexico Cartels Corrupt US Border Agents," InSight Crime, January 19, 2016, <http://www.insightcrime.org/news-analysis/mexico-cartels-us-border-patrol-corruption>.

3. Texas Department of Public Safety, "Assessing the Treat of Human Trafficking in Texas," National Human Trafficking Resource Center, April 2014, <https://traffickingresourcecenter.org/resources/assessing-threat-human-trafficking-texas>.

4. Bill Gertz, "Southern Command Warns Sunni Extremists Infiltrating from South," *Washington Free*

Beacon, August 22, 2016, <http://freebeacon.com/national-security/southern-command-warns-sunni-extremists-infiltrating-south/>.

5. Stephen Dinan, "Smuggling Network Guided Illegals from Middle East Terror Hotbeds to US Border," *Washington Times*, June 2, 2016, <http://www.washingtontimes.com/news/2016/jun/2/smuggling-network-guided-illegal-immigrants-from-m/>; and Michael Kaplan, "ISIS Crossing Southern Border from Mexico? Terror Debate Sparks Alarm over Possible Islamic State Immigration," *International Business Times*, December 9, 2015, <http://www.ibtimes.com/isis-crossing-southern-border-mexico-terror-debate-sparks-alarm-over-possible-islamic-2216434>.

6. Steven C. McCraw, testimony before the Subcommittees on National Security and Government Operations, House Committee on Oversight and Government Reform, US House of Representatives, March 23, 2016, 5, <https://oversight.house.gov/wp-content/uploads/2016/03/2016-03-23-McCraw-Testimony-TDPS.pdf>.

7. *Ibid.*, 6.

8. *Ibid.*, 4.

9. *Ibid.*

10. Todd Bensman, "The Ultra-Marathoners of Human Smuggling: Defending Forward Against Dark Networks That Can Transport Terrorists Across American Land Borders," Naval Postgraduate School, 2015, 84, http://calhoun.nps.edu/bitstream/handle/10945/47231/15Sep_Bensman_Todd_Needs_Supplemental.pdf?sequence=1.

11. Brandon Darby, "Leaked FBI Data Reveal 7,700 Terrorist Encounters in USA in One Year; Border States Most Targeted," *Breitbart*, September 26, 2016, <http://www.breitbart.com/texas/2016/09/26/leaked-fbi-data-reveal-7700-terrorist-encounters-usa-one-year-border-states-targeted/>.

12. Gertz, "Southern Command Warns Sunni Extremists Infiltrating from South."

13. *Ibid.*

14. Texas Department of Public Safety, "Texas Border Security," February 2015, copy on file with author.

15. William W. Chip, "Mass Deportations vs. Mass Legalization: A False Choice," Center for Immigration Studies, October 2015, <http://cis.org/Mass-Deportations-or-Mass-Legalizations-A-False-Choice>.

16. US Citizenship and Immigration Services, "E-Verify," <https://www.uscis.gov/e-verify>.

17. Kris W. Kobach, "The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests," *Albany Law Review* 69 (2005): 183.

18. *Ibid.*, 188.

19. Marielena Hincapie, "Letter to President Obama Regarding 287(g) Program," National Immigration Law Center, http://acluaz.org/sites/default/files/documents/LETTER_TO_PRESIDENT_20090825133229.pdf.

20. The reality on the wage-suppression aspect of illegal immigration is that wages would rise without the cheaper labor provided by illegal immigrants, but those wage increases likely would not be enough to attract the requisite number of Americans to fill all the jobs needed in those lower-paying jobs.

21. Miriam Jordan, “Demand for H1-B Skilled-Worker Visas Forces Agency into Lottery,” *Wall Street Journal*, April 7, 2016, <http://www.wsj.com/articles/demand-for-skilled-worker-visas-exceeds-u-s-supply-in-5-days-1460061278>.

22. Katrin Bennhold, “France Uses Money, Not Manacles, for Deportation,” *International Herald Tribune*, December 20, 2006, <http://www.ihl.com/articles/2006/12/20/news/migr.de.php>.

23. Mark Hosenball and Tim Reid, “Exclusive—US to China: Take Back Your Undocumented Immigrants,” *Reuters*, September 11, 2015, <http://www.reuters.com/article/us-usa-china-deportations-exclusive-idUSKCN0RBoDo20150911>.

24. Ron Nixon, “US Doesn’t Know How Many Foreign Visitors Overstay Visas,” *New York Times*, January 1, 2016, <http://www.nytimes.com/2016/01/02/us/politics/us-doesnt-know-how-many-foreign-visitors-overstay-visas.html>.

25. Jon Feere, “Birthright Citizenship in the United States: A Global Comparison,” Center for Immigration Studies, August 2010, <http://cis.org/birthright-citizenship>.

26. *Ibid.*

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